Michigan Law Review

Volume 68 | Issue 7

1970

Community Control, Public Policy, and the Limits of Law

David L. Kirp
Harvard University

COMMUNITY CONTROL, PUBLIC POLICY, AND THE LIMITS OF LAW

*David L. Kirp**

CONCERN about the governance of public education is no longer the exclusive domain of a limited number of professionals and a complement of academic critics. Rarely does one pick up a newspaper without encountering assertions by community groups—generally poor, black, and organized—of the right to run their own schools. Those assertions challenge existing assumptions about the proper allocation of power and responsibility and suggest a different understanding of what interests in education require formal political recognition. Those assertions also reveal conflicts within the field of education that have not previously existed or—perhaps more accurately—have not previously been noticed.

The impetus for community control of schools, or school decentralization (the terms have come to be used interchangeably), has developed in the past four years, breathtakingly quickly for the heretofore placid realm of education.[1] The urban community control movement began in New York City with an experiment sponsored by the Ford Foundation and designed to ease tensions in one querulous Harlem school district. This first experiment was rapidly transformed into a series of state-endorsed district-wide undertakings, and ultimately into a mandate for restructuring public education for the whole of New York City.[2] Other cities, including

---

* Director, Center for Law and Education, Harvard University; Assistant Professor, Harvard Graduate School of Education. A.B. 1965, Amherst College; LL.B. 1968, Harvard University.—Ed.

Derrick Bell, Abram Chayes, Andrew Kaufman, and Frank Michelman of the Harvard Law School, and Stephen Arons, Tom Parmenter and Mark Yudof of the Center for Law and Education, Harvard University, offered helpful comments on earlier drafts of this Article, which was partially financed by a grant from the Office of Economic Opportunity to the Center for Law and Education, Harvard University. I wish to express my particular appreciation to David K. Cohen, Associate Professor at the Harvard Graduate School of Education, without whose thoughtful and thorough criticisms this Article would have been finished months ago.

1. "Community control" and "decentralization" are used interchangeably throughout this Article. A second meaning of "decentralization," namely, the allocation of substantial power to district (rather than city-wide) *administrations*, is not used. *See* Fein, *Community Schools and Social Theory: The Limits of Universalism*, in COMMUNITY CONTROL OF SCHOOLS (H. Levin ed. 1970); Kristol, *Decentralization for What?*, PUB. INTEREST, Spring 1968, at 17.

2. The literature spawned by the New York City dispute is awesome. Pertinent portions are collected in M. BERUBE & M. GITTELL, CONFRONTATION AT OCEAN HILL-BROWNSVILLE (1969); *see also* M. MAYER, THE TEACHERS' STRIKE, NEW YORK, 1968 (1969).

Washington, D.C., Detroit, and Boston, are not far behind New York.[3]

New York's experience with decentralization has been acrimonious. That city experienced two extended city-wide strikes by the teachers' union, racial tensions distinguished chiefly by the intensity of rhetorical invective, union charges that the teachers' right to due process of law was being violated, and countercharges by community leaders that there had been political sabotage of an educational experiment. While the trauma of the New York situation will probably not be repeated (New York is a most unreliable political weathervane), what Jason Epstein has called "a conflict of opposing principles reflecting powerful and apparently irreconcilable class interests"[4] will recur elsewhere. Struggles are inherent in the very notion of community control over leadership and power and the resultant control over jobs and finances and curriculum.

Implicit in arguments over who should run the schools are conflicting assumptions concerning what interests demand recognition and how power should be allocated. The nominal terms may vary: educators speak of professionalism; educational researchers focus on social-class effects; politicians worry about the availability of dollars. But the power dimension, with its inevitable racial overtones, is fundamental. By considering the conflict to be one over power, one can more easily understand both the protracted and frustrating fifteen-year effort to disestablish separate schools in the South and the hostility in the North to such presumably beneficial arrangements as integrated metropolitan school districts. Concern about the allocation of power illuminates opposition to proposals for community controlled schools—proposals which would grant "communities," including racially defined enclaves, real power over teachers, curriculum, and dollars.

That power and race are central to an understanding of the bitterness generated by community control indicates that education has come to provide a setting for larger unresolved social and political problems. The debate about educational policy points up basic

3. In two states, decentralization has been the subject of considerable controversy. In Michigan, decentralization of Detroit's public schools has been opposed by parents and state legislators who object to the substantial integration that would result if the Detroit school board's plan were adopted. N.Y. Times, April 12, 1970, § 1, at 51, col. 1. In Massachusetts, legislation which would have permitted cities larger than 150,000 to decentralize their schools has been sent to committee and proponents are not sanguine about its chance of re-emerging. Personal communication from Lawrence Kotin, Mass. Law Reform Institute, June 8, 1970. A suit seeking decentralization of Boston's schools is currently being pressed. *See* text accompanying notes 104-06 *infra*.

4. Epstein, *The Brooklyn Dodgers*, NEW YORK REVIEW OF BOOKS, Oct. 10, 1968, in M. BERUBE & M. GITTEL, *supra* note 2, at 319.

and ignored ideological differences that divide interests in our society. It embodies what Epstein, speaking of the New York City school crisis, termed a "spontaneous and apparently irresistible surge of democratic fundamentalism, arising from a revulsion toward established social and political institutions."[5] It is the consequence of what sociologist Robert Nisbet, writing some years earlier, diagnosed as "the failure of our present democratic and industrial scene to create new contexts of association and moral cohesion within which the smaller allegiances of men will assume both functional and psychological significance."[6]

Those concerned about education rightly regard the debate over community control as important, whether measured in terms of dollars, power over jobs, or power over children's lives. Northern black leaders view the debate as an all-or-nothing contest: since the joint efforts of blacks and Northern liberals to promote integration have failed, blacks have concluded that they can attain "legitimacy" only by asserting dominion over their own community.[7] In seeking community control, they come into conflict with traditional conceptions of governance and power. They also encounter possible constitutional challenges.

This Article deals with those two points of conflict—disputes about governance, race, and political power; and constitutional concerns, rooted in *Brown v. Board of Education*,[8] about racially heterogeneous education. Both are central to understanding, and to giving content to, the disagreements about community control. The questions about power provide a context within which to understand the terms of the debate. The constitutional discussion suggests some inevitable judicial difficulties in resolving disputes that emerge from the debate. Such questions are increasingly before the courts, whose decisions may alter the bounds of acceptable conduct in ways that permit or deny the legitimacy of new arrangements such as community control, or for that matter old arrangements such as de facto segregation.

This Article begins with a foray into the social context of the control question, noting briefly the competing social philosophies that form the basis for discussion. It then examines the constitutional questions, reconsidering the implications of the ambiguous

5. *Id.* at 332.

6. R. NISBET, COMMUNITY AND POWER (formerly THE QUEST FOR COMMUNITY) 73 (1962 ed.).

7. *See* Hamilton, *Race and Education: A Search for Legitimacy*, in EQUAL EDUCATIONAL OPPORTUNITY 187 (HARV. EDUC. REV. ed. 1969).

8. 347 U.S. 483 (1954).

equal-educational-opportunity standard in light of the debate over control, and stressing the difficulties that the courts will encounter in coping with these matters.

I. The Political and Social Contest

> Men journey together with a view to particular advantage, and by way of providing some particular thing needed for the purposes of life, and similarly the political association seems to have come together originally, and to continue in existence, for the sake of the *general* advantages it brings.[9]

At least since *The Federalist Papers* articulated a theory of governance, most American political philosophy has viewed particularistic groups—communities and factions generally—with alarm, and has stressed the need to curb the "effects of the unsteadiness and injustice [with] which a factious spirit tainted our public administration" by "break[ing] and control[ling] the violence of faction."[10] The traditional American philosophy has therefore advocated a movement of the level of deliberation and the locus of power away from the small, and presumably parochial, group to the larger universal community—toward "secularism, rationality, and universalism and against tradition, ritual, and community."[11] If any lesser community merited recognition, according to this view, it was only the "community of limited liability"[12]—a self-formed community limited in scope and function, created by the volitional acts of individuals, fluid enough to permit its members to come and go as they choose, and yet sufficiently narrowly defined both to permit individuals to belong to several seemingly inconsistent "communities" (a progressive day school for the children, a traditional suburb for the family) and to protect those choices. The form of government best suited to protecting "universal" interests was, of course, a representative republic governing a large area, not a pure democracy for a geographically limited region. Even the political pluralists, who have recognized the importance of factions in influencing political decisions, focused their attention on general issues and advocated system-wide, rather than faction-wide or community-wide, resolution of those issues.[13]

---

9. Aristotle, Ethics 8. 9. 1160a (M. Ostwald ed. 1962).

10. The Federalist No. 10, at 77-78 (E. Cooke ed. 1961) (J. Madison).

11. Fein, *supra* note 1, at 89.

12. S. Greer, The Emerging City: Myth and Reality 107-37 (1962).

13. *See, e.g.*, R. Dahl, Who Governs? Democracy and Power in an American City (1961).

For several reasons, current advocates of community control take issue with these conventional political and social assumptions. They find them unresponsive to the individual's need to exercise control over his own environment. More pertinently, they regard them as incompatible with the need of small groups to determine their fate collectively. As Robert Nisbet puts the point:

> To create the conditions within which autonomous *individuals* could prosper, could be emancipated from binding ties of kinship, class, and community, was the objective of the older *laissez faire*. To create conditions within which autonomous *groups* may prosper must be, I believe, the prime objective of the new *laissez faire*.[14]

Community control advocates regard the traditional philosophical assumptions as inconsistent with the American historical record, which reveals both a series of de facto grants of power to those who already hold power in other political areas and a relegation of the less well-situated to the unhelpful care of the state and city. Furthermore, they see in the centralization of power and control an effort to exploit—economically, culturally, and politically—the smaller communities for the advantage of the larger, rather than any attempt at universalistic conflict resolution.[15] Milton Kotler has noted that

> [n]eighborhood government moves toward territorial public power as the basis of creating new social institutions. Furthermore, having government authority is more fundamental to changing social conditions than having a vital economic role.
>
> The strategy of white liberal politics is the opposite; it aims to increase its political power through its economic role.[16]

The community control advocates would substitute not the community of limited liability, with its stress on individual choice, but the "diffuse organic community, based as much on mystique as on reason, acting as a primary group to its members, speaking a private tongue."[17] Such a community would be based on "territorial facts . . . commonly shared."[18] The larger government would intrude only

---

14. NISBET, *supra* note 6, at 278.

15. There exists economic support for the community control approach:

> . . . there is a case for a separate governmental institution for each ghetto, whenever group differences in taste for collective goods are important and the patterns of segregation in housing are not amenable to change. The collective goods then have relatively well-defined boundaries given by the boundaries of the ghetto, and governmental institutions which conform to these boundaries are a necessary condition for Pareto optimal provision of public services.

Olsen, *Strategic Theory and Its Applications*, AM. EC. REV., May 1969, at 479, 484.

16. M. KOTLER, NEIGHBORHOOD GOVERNMENT 92 (1969).

17. Fein, *supra* note 1, at 92-93.

18. KOTLER, *supra* note 16, at 64, 65.

to provide needed resources. Central to the existence of this kind of community is its claim of authority to govern local matters:

> A claim of political authority emanates from lengthy community consideration of the many public issues that can cause people distress, until they realize that local problems are caused by bad *laws*, and can be solved only when the community is empowered to make its own laws.[19]

Seen in this perspective, the call for community controlled schools is but one aspect of a broader set of demands for community control over governance.[20] These demands pose another set of problems. Kotler, for example, appears to assume that the state will be willing, or at least can be coerced, to provide resources to the community, while divesting itself of control over those resources—an assumption of doubtful political merit. Even more problematic is the community control supporters' assumption that there exist substantial communities capable of agreeing among themselves on priorities and policies. The American black community is not so united. It is split both regionally and philosophically between two poles of assimilation and control, and this division makes common policy difficult to attain. Such divisions indicate the necessity of constructing arrangements that will enable communities to make choices without destroying the rights of individuals. As Rousseau so magnificently phrased the point, the task is "to find a form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before."[21]

This is not the sort of dilemma traditionally put to judicial resolution. It involves basic social choices more typically left to the legislature. But in *Brown v. Board of Education*,[22] the Supreme Court formulated a constitutional requirement of equal educational opportunity. Inasmuch as certain aspects of community control may

---

19. *Id.* at 73-74.

20. This tension has its roots in classical sociology, most prominently in Ferdinand Tonnies' discussion of *Gemeinschaft* (community) and *Gesellschaft* (usually translated as society, and describing "a special type of human relationship: one characterized by a high degree of individualism, impersonality, contractualism, and proceeding from volition or sheer interest rather than from the complex of affective states, habits, and traditions that underlies *Gemeinschaft*."). R. NISBET, THE SOCIOLOGICAL TRADITION 74 (1966). Chapter three of *The Sociological Tradition* is the primary source of this discussion; it offers a most helpful analysis of "community" in classical sociological literature.

21. J. ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 13 (G. Cole ed. 1950).

22. 347 U.S. 483 (1954).

be thought to conflict with that requirement, the burden of appraising these basic social issues is thrust upon the courts. The courts do not have to determine whether any particular proposal is "good" or "bad," but they do have to determine whether it is constitutionally permissible. Unfortunately, one effect of *Brown* and its progeny is that the distinction between those two questions has become blurred, if not entirely erased. As a result, the decision which was necessary to protect minority interests may have the unintended effect of making impermissible some changes in educational systems which would, if permitted, further advance those same minority interests. It is therefore necessary to examine the application of constitutional considerations to the establishment of effective forms of community control.

II. Is Community Control Constitutionally Permissible?

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[23]

In *Brown v. Board of Education* the Supreme Court declared that "separate educational facilities are inherently unequal" and deprive Negro children of equal educational opportunities.[24] The scope of the resulting "equal opportunity" principle remains ambiguous. *Brown* may be read in a number of ways, some of which cast doubt on the constitutionality of an approach, such as community control, which moves away from desegregation by affording status and legitimacy to racially defined communities.[25]

The narrowest reading of *Brown* bars only that segregation based explicitly on race. Such de jure segregation had been in force in the Southern and border states represented by the defendants in *Brown*. But is the ambit of the decision limited to Southern school desegregation? Was it the *explicitness* of Southern segregation or the very *existence* of segregation, in the North or South, that troubled the Court?

The way in which *Brown* is interpreted has important implications for community control. If the Court meant to dismantle those

23. 347 U.S. at 493.

24. 347 U.S. at 495.

25. This discussion assumes that decentralized districts will be relatively homogeneous in racial and social make-up—an assumption based on the experience of those cities in which control has thus far been an issue. Of course, there may be instances in which small heterogeneous communities demand the opportunity to run their own schools. Such a demand, however, would raise none of these constitutional questions.

dual educational systems which had previously existed through force of law, other forms of racial isolation—including, presumably, community control—are not proscribed.[26] If, on the other hand, the Court felt that racial segregation was constitutionally repugnant whether or not mandated by law, *Brown* makes integration an affirmative constitutional requirement.

While the debate about *Brown* has most frequently centered on whether de facto, as well as de jure, segregation is unconstitutional, two other elements of that decision merit attention in considering the constitutionality of community control. The segregation condemned in *Brown* was involuntary; the plaintiffs had been given no choice but to send their children to an all-black school. By striking down this restriction of individual choice, *Brown* clearly upholds the right of free association of individuals against irrational state curbs on that right. In that respect, it is less a case concerned with education than a pronouncement about general public behavior. If the *Brown* Court's focus on uncoerced association is significant, it might enable a court to accept a community control arrangement which coupled neighborhood-run schools with a provision permitting children to opt for an integrated education outside the neighborhood.[27]

The Supreme Court in *Brown* also noted the adverse effect of segregation on the quality of education afforded black children, suggesting that integration was not regarded as an end valued in itself, but as a means of ensuring equal educational outcomes. Such a reading of the case leaves extant the possibility that plausible alternatives to desegregation as means of promoting equality—such as community control—would be acceptable.

The *Brown* Court focused on no single element of segregation as the basis of its proscription. In *Brown* the Court appears to have posited integration, uncoerced association, and racially equal educational outcomes as aspects of the same end. Today that assumption lacks validity: racial integration by itself will not ensure free association or equalize educational outcomes. Moreover, the value of integration has been called into question by those who renounce racially heterogeneous schooling in favor of community control, asserting the inadequacy of any other solution. In light of the ambiguous legal doctrine, and in light of new questions of ideology, it

26. Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 Nw. U. L. Rev. 157 (1963) suggests this interpretation.

27. It is important to realize that community controlled schools are different in kind from the "freedom-of-choice" plans which the Supreme Court rejected in Green v. County School Bd., 391 U.S. 430 (1968).

seems appropriate to attempt to identify again the unconstitutional aspects of segregation and to re-evaluate the means available for remedying these fatal defects.

The dimensions of the problem vary enormously between the North and the South, and even within different communities in each region. The complexity of issues, whether viewed as legal conundrums or as regional fact patterns susceptible to differing understandings, augurs ill for any effort at unitary solution. In the South, the courts continue to strive for an end to the dual system of schooling which *Brown* clearly found unconstitutional.[28] The push has been slow and costly, both in terms of judicial energy and, more notably, in terms of deferred educational promises. Southern school districts have shown considerable and lamentable ingenuity in evading *Brown*. They put forth a whole host of alternatives—such as massive resistance, freedom-of-choice plans, neighborhood schools (where neighborhoods were residentially segregated), and tuition-voucher schemes—which effectively retained segregation under various guises.[29] The Snopes-like recurrence of the leading Southern cases—*Griffin v. State Board of Education*,[30] *Poindexter v. Louisiana Finance Assistance Commission*,[31] *United States v. Jefferson County Board of Education*,[32] *Goss v. Board of Education*,[33] and *Brewer v. Norfolk School Board*[34]—attests to the extent of the evasion.[35] The

28. There is a vast difference in the history of public education between the South and the North. *See* R. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE 250 (1956). The South has never had common schools as such. Almost from the first, public schools were racially separate enterprises. In Louisiana, for example, the legislature enacted the first public school act in 1847. It provided at least three years schooling for "any youth (white, of course) under 21." E. FAY, THE HISTORY OF EDUCATION IN LOUISIANA 69 (1898). Despite the Supreme Court's mandate in Plessy v. Ferguson, 163 U.S. 537 (1896), that separate facilities had to be "equal," black schools were never equal to white schools. Less money was spent for buildings, teachers, and materials in black schools; those schools were open fewer days of the year; and they offered more limited training. Kirp, *The Poor, the Schools, and Equal Protection*, in EQUAL EDUCATIONAL OPPORTUNITY 139, 151 (HARV. EDUC. REV. ed. 1969).

29. *See, e.g.*, Louisiana Fin. Assistance Commn. v. Poindexter, 389 U.S. 571 (1968); Green v. County School Bd., 391 U.S. 430 (1968); Raney v. Board of Educ., 390 U.S. 936 (1968).

30. 296 F. Supp. 1178 (E.D. Va. 1969).

31. 275 F. Supp. 833 (E.D. La. 1967), *aff'd.*, 389 U.S. 571 (1968).

32. 417 F.2d 834 (5th Cir. 1969).

33. 373 U.S. 683 (1963).

34. Brewer v. Norfolk School Bd., 397 F.2d 37 (4th Cir. 1968); *remand*, Beckett v. Norfolk School Bd., 302 F. Supp. 18 (E.D. Va.), *rehearing*, 308 F. Supp. 1274 (E.D. Va. 1969).

35. *Cf.* Bossier Parish School Bd. v. Lemon, 370 F.2d 847, 849 (5th Cir. 1967). "This court has had to deal with a variety of reasons that school boards have managed to dredge up to rationailze their denial of the constitutional right of Negro schoolchildren to equal educational opportunities with white children. This case presents a new and bizarre excuse. . . ." (Judge Wisdom).

dismantling of the Southern dual educational system will presumably be hastened by the Supreme Court's recent insistence that schools must desegregate "at once."[36] The Southern black community continues to press for a single system of public schools and an end to the vestiges of separate and inferior education.

In the South, therefore, community control seems both an unlikely demand for the black community to make and, at least until the dismantling of separate schools has been fully accomplished, of doubtful constitutionality.[37] The essence of Southern segregation is domination: the imposition of a separate system of schools upon the black community, against the will of its leaders, unaccompanied by any transfer of power or control. Under such a system, choice is a chimera, rightly and forcefully condemned by the courts.[38] Community control is a quite different, indeed antithetical, notion. It connotes an active choice of dominion over the community's schools by a group which defines itself as a community for the purpose of making the choice. The concept of community control further implies a transfer of significant power to the community in order to make meaningful the exercise of control. Advocates of community control argue that equal educational opportunity can be achieved through means other than integration, that the opportunity for a parent to exercise real and direct influence over his children's education—to be able to hold the school accountable for its failures—carries with it educational benefits.[39] It is segregation without choice

36. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

37. "The [school] board's duty is not discharged until the all-Negro schools in the system are done away with. . . ." United States v. Choctaw County Bd. of Educ., 417 F.2d 838, 839 (5th Cir. 1969).

38. *See, e.g.*, Goss v. Board of Educ., 373 U.S. 683, 686 (1963). "The right of transfer . . . is a one way ticket leading to but one destination, *i.e.*, the majority race of the transferee and continued segregation." *See also* Green v. County School Bd., 391 U.S. 430 (1968); Goss v. Board of Educ., 406 F.2d 1183 (6th Cir. 1969); Walker v. County School Bd., 413 F.2d 53 (4th Cir. 1969); Davis v. Board of School Commrs., 414 F.2d 609 (5th Cir. 1969); Jackson v. Marvell School Dist., 416 F.2d 380 (8th Cir. 1969); United States v. Lovett, 416 F.2d 801, 807 (5th Cir. 1969) ("state-*imposed* segregation of the races") (emphasis added); United States v. Jefferson County Bd. of Educ., 417 F.2d 834 (5th Cir. 1969); United States v. Choctaw County Bd. of Educ., 417 F.2d 838 (5th Cir. 1969); United States v. Hinds County School Bd., 417 F.2d 852 (5th Cir. 1969).

Gomillion v. Lightfoot, 364 U.S. 339 (1960), is the clearest example of this imposition, in a somewhat broader context. In *Gomillion*, the state legislature detached the predominantly black section of a city from the rest of the city and created a separate community, which had to provide its own public services. The Court overturned the separation, noting that

> the essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save only four or five of its 400 Negro voters while not removing a single white voter or resident. The result of this Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including *inter alia*, the right to vote in municipal elections.

364 U.S. at 341.

39. Hamilton, *Race and Education: A Search for Legitimacy*, 38 HARV. EDUC. REV. 669, 681-84 (1968).

or control that Southern schoolmen have proffered and black leaders oppose, and the Southern black community has thus far been disinclined to propose the very different separation implicit in community control. Moreover, in order to eliminate state-imposed segregation, federal courts in the South have found it necessary to strike down all proposed alternatives to desegregation that would have operated to maintain the status quo.[40] Until the vestiges of the dual school system are abandoned, courts are unlikely to embrace community control where communities are racially and socially defined.[41]

In the North, on the other hand, black leaders have come to regard community control of schools as the most promising means of securing educational equality.[42] Certain of the educational ends that they seek are similar to those sought by the integrationists: schools that can succeed in teaching basic cognitive skills, such as reading and ciphering, to poor and black school children; schools that can prepare children to cope with life in a complex and too often hostile environment. Community control advocates argue either that integration has not worked, or, more typically, that the political will to attempt it has been lacking.[43] As a result, they contend, continuing reliance on integration as a means for achieving the desired educational ends no longer seems appropriate.[44] Rather, in their view, control, and the educational, psychological, and political benefits that assertedly follow from such control, is a preferable means.

Judicial insistence that Southern schools integrate "at once,"[45] coupled with the increasing willingness of Northern courts to identify racially motivated practices of city school boards as illegitimate,[46] makes evident the potential conflict between community control in the North and the *Brown* rule. The conflict may be simply put: decentralization promotes racial isolation; *Brown* inveighs against it. If *Brown* is read to disallow all racial separation, community control will be found to be unconstitutional; and no

40. *See, e.g.*, Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969); Green v. County School Bd., 391 U.S. 430 (1968); Louisiana Fin. Assistance Commn. v. Poindexter, 389 U.S. 571 (1968).

41. *Cf.* Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 610 (1965): where a community is ". . . politically impotent or deliberately excluded from the political process . . . the appeal inherent in a negotiated resolution of competing interests is lacking. . . ."

42. Hamilton, *supra* note 39, at 670-76.

43. *See* Cohen, *The Price of Community Control*, COMMENTARY, July 1969, at 23.

44. *Id.*

45. Alexander v. Holmes County Bd. of Educ., 396 U.S. 19 (1969).

46. *See* text accompanying notes 71-80 *infra*.

expression favoring separateness, even if made by the majority of a black community, will be able to cure the constitutional defect.[47]

Yet that reading of *Brown* seems overly mechanical and is peculiarly unresponsive to different factual contexts and to the educational consequences of alternative arrangements.[48] It also fuses two elements of the decision that merit separate analysis: *Brown*'s concern with *educational* consequences, and its concern with *associational* consequences.

In *Brown* the Court explicitly framed its ruling in terms of educational outcomes, citing the effect of segregated schooling on black children.[49] This effect presumably would have existed whether segregation had come about adventitiously or through force of law. In the intervening fifteen years, the educational evidence has changed.[50] Furthermore, Northern federal courts have generally been unwilling to cast the rights of black school children in substantive educational terms.[51]

The *Brown* Court apparently assumed that racial isolation causes racially different outcomes and that racial integration will yield racially identical results. Current social-science evidence drastically qualifies that assumption. It suggests that race has only a modest effect on schooling success and that social-class integration is more

---

47. This is analogous to the position that the Supreme Court has taken with respect to the "one man-one vote" constitutional standard. In a case arising from Colorado, the Court concluded that the electorate's approval of a legislative-apportionment plan which varied from the "one man-one vote" standard was irrelevant in determining the plan's constitutionality once a dissident minority had challenged that plan.

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a state's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of people choose that it be.

Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736-37 (1964). The case is particularly interesting because a majority of voters in every county in the state approved the challenged apportionment scheme.

48. *Cf.* Fiss, *supra* note 41, at 608.

49. Segregation of white and colored children in public schools has a detrimental effect upon the colored children. . . . A sense of inferiority affects the motivation of the child to learn. Segregation with the sanction of the law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system. Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. 347 U.S. at 494.

50. *See, e.g.*, UNITED STATES COMMN. ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967); EQUAL EDUCATIONAL OPPORTUNITY (HARV. EDUC. REV. ed. 1969).

51. The rejection of the justiciability of the "educational-needs" concept is the clearest example of this judicial unwillingness. *See* McGinnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *affd. sub nom.*, McGinnis v. Ogilvie, 394 U.S. 322 (1969); Burrus v. Wilkerson, 301 F. Supp. 1237 (W.D. Va. 1969), *affd.*, 397 U.S. 44 (1970).

likely than is racial integration to lead to significant educational benefits for poor and black school children.[52] Even more important, the limitations of the evidence from social science are also more plain today. The research commends no single strategy as likely to produce educational equality, no strategy likely to overcome the nonschool differentials that find their way into outcomes measured by reading and arithmetic comprehension tests. In short, equality of educational outcomes—the most significant measure of opportunity to the children primarily affected—appears unattainable by any single pattern of educational intervention. There are a variety of alternative educational approaches. These include compensatory-education programs, such as those established by title I of the Elementary and Secondary Education Act,[53] which would provide added educational resources to disadvantaged children; the establishment of metropolitan school districts, which would foster race and class heterogeneity; and the use of tuition vouchers, which would promote educational choice by permitting students to enroll in private or public schools.[54] The effectiveness of such programs remains for the most part undetermined.

In the face of such an educational dilemma, the Court would be unwise to equate equality of educational opportunity—the constitutional standard—with equality of educational outcome; exhortations to do the impossible do not make good law.[55] For the community control advocate, this seems fortunate, since the evidence suggesting the educational efficacy of community control is slim indeed.[56] While there is substantial rhetoric to the contrary, little data exists which indicates that community control alone, without substantial infusions of dollars and resources, would significantly change educational outcomes. The notion of community control is at its heart a political statement, equally appropriate in the context of police or fire protection. But that often camouflaged fact should not in itself make community control any less acceptable to the courts; few contrary educational assertions carry much empirical weight.

---

52. *See, e.g.*, U.S. NATL. CENTER FOR EDUC. STATISTICS, EQUALITY OF EDUCATIONAL OPPORTUNITY (J. Coleman ed. 1966); EQUAL EDUCATIONAL OPPORTUNITY (HARV. EDUC. REV. ed. 1969).

53. 20 U.S.C. §§ 241 a-m (Supp. IV, 1965-1968).

54. *See* Jencks, *Is the Public School Obsolete?*, THE PUBLIC INTEREST, Winter 1966, at 23-24.

55. *Cf.* Lon Fuller's discussion of the "morality of aspiration" in THE MORALITY OF LAW 5 (1964).

56. *See* Pettigrew, *Race and Equal Educational Opportunity*, in EQUAL EDUCATIONAL OPPORTUNITY 69 (HARV. EDUC. REV. ed. 1969); Cohen, *The Price of Community Control*, COMMENTARY, July 1969, at 23.

Northern federal courts have dealt with school segregation in different ways. During the 1960's, they were generally unwilling to order school boards to overcome harm assertedly caused by adventitious de facto segregation.[57] While one federal district court declared that "there must be no segregated schools,"[58] three federal courts of appeal read *Brown* as prohibiting only de jure school segregation.[59] In so doing, the courts focused not on the educational consequences of segregation, but rather on its associational consequences.

In *Deal v. Cincinnati Board of Education*,[60] the United States Court of Appeals for the Sixth Circuit provided the clearest explication of this position. The court rejected the plaintiff's claim that they were constitutionally entitled to a remedy for the educational harm done to black children by requiring them, through adherence to a neighborhood school policy, to attend predominantly black schools. It viewed the wrong addressed in *Brown* not in terms of educational damage, but as an arbitrary racial classification proscribed by the equal protection clause:

> The essence of the *Brown* decision was that the Fourteenth Amendment does not allow the state to classify its citizens differently solely because of their race. While the detrimental impact of compulsory segregation on the children of the minority race was referred to by

57. Paradoxically, the factual basis for finding discriminatory intent seems strongest in Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.), *affd.*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 877 U.S. 924 (1964), the leading case rejecting the principle that de facto segregation is unconstitutional. In *Gary*, schools had been formally segregated, as authorized by Indiana state law, until 1948. In 1953, the school board explained that a school boundary which created an all-black school had been adopted because "it is not considered good for children of a closely knit community, such as the [overwhelmingly black] Project, to attend different schools." 213 F. Supp. at 823-24. Other decisions by the board concerning districting and school construction suggest similar racial motivation. *See* Kaplan, *Segregation, Litigation and the Schools—Part III: The Gary Litigation*, 59 Nw. U. L. Rev. 121 (1965).

In contrast, Taylor v. Board of Educ., 191 F. Supp. 181 (S.D.N.Y.), *appeal dismissed as premature*, 288 F.2d 600 (2d Cir.), *remedy considered on rehearing*, 195 F. Supp. 231 (S.D.N.Y.), *affd.*, 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961), found and proscribed de jure segregation on far slimmer factual grounds: hearsay evidence that district lines had been gerrymandered in 1930, and a policy—terminated in 1949—of permitting whites to transfer out of a predominantly black school.

58. Barksdale v. School Comm., 237 F. Supp. 543, 547 (Mass.), *revd. on other grounds*, 348 F.2d 261 (1st Cir. 1965). *See also* Blocker v. Board of Educ., 226 F. Supp. 208 (E.D.N.Y. 1964); Branche v. Board of Educ., 204 F. Supp. 150 (E.D.N.Y. 1962); Jackson v. Pasadena City School Dist., 59 Cal. 2d 875, 382 P.2d 878, 31 Cal. Rptr. 606 (1963) (dictum).

59. *See, e.g.*, Deal v. Cincinnati Bd. of Educ., 244 F. Supp. 572 (S.D. Ohio), *affd.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 849 (1967); Bell v. School City of Gary, 213 F. Supp. 819 (N.D. Ind.), *affd.*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964); Downs v. Kansas City, 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

60. 369 F.2d 55 (6th Cir. 1966).

> the Court, it was not indispensable to the decision. Rather, *the Court held that segregation of the races was an arbitrary exercise of governmental power* inconsistent with the requirements of the Constitution.[61]

The *Deal* court regarded choice, unconstrained by "irrelevant barriers,"[62] as crucial to the Supreme Court's holding in *Brown*: "The element of inequality in *Brown* was the unnecessary restriction of freedom of choice for the individual based on the fortuitous, uncontrollable, arbitrary factor of his race."[63]

Unconstrained freedom of association is, at first blush, an arrestingly attractive judicial concept. It falls within the ambit of traditional equal protection decisions;[64] and it removes the court from the troublesome business of reviewing discretionary acts, such as adherence to a neighborhood school policy, for which some educational justification can be shown. Indeed, it is "choice" that community control advocates favor in arguing that certain self-defined communities have a right to manage their own educational affairs.

Yet where the self-selected community is predominately black (or Puerto Rican or Mexican-American), the exercise of choice may yield constitutionally troubling consequences. The clear teaching of *Green v. County School Board*[65] is that a politically dominant white community cannot opt for a nominally free-choice arrangement which in fact excludes black students from formerly all-white schools.[66] Does community control, insofar as it promotes racially identifiable communities, fall within the category of discriminatory association condemned by *Brown* and *Green*? The question is more sharply posed in the context of a hypothetical lawsuit, brought by a black parent, challenging a community control arrangement on the grounds that the effect of such an arrangement is to deny his children the opportunity to associate with white school children. If the community is indeed racially defined, and if the arrangement offers the parent no option but to send his child to the neighborhood (and black) school, the parent's argument is appealing: his children do not have the chance to go to school with white children; and

61. 369 F.2d at 58-59 (emphasis added).

62. 369 F.2d at 59.

63. 369 F.2d at 60.

64. *See, e.g.*, Tussman & tenBrook, *Equal Protection of the Law*, 37 CALIF. L. REV. 341 (1949).

65. 391 U.S. 430 (1968).

66. "Implicit in *Brown's* condemnation of governmentally imposed segregation is the judgment that the satisfaction of discriminatory associational desires is not a legitimate government function where the result is segregated education." Fiss, *supra* note 41, at 575 n.7.

the source of that denial is the official policy of the school board, not just the happenstance of residence.

Certainly, there are differences between the rationale that prompts community control and the rationale for other forms of segregated schooling. But the effect is the same—state-promoted racial isolation. The remedy in such a situation, however, is not necessarily that community control be struck down in its entirety. If unconstrained choice is the value to be conserved, the parent's concern extends only to his children and to the class of children in the community who are prevented by the community control plan from attending integrated schools. If the arrangement were structured in such a manner as to attend, at public expense, a school in which his race is a minority, this constraint on choice would be removed. The arrangement might then, and only then, be constitutionally acceptable.[67] The constitutional question has not, however, been posed to the courts in this form. Decisions striking down freedom-of-choice plans in the South assumed, quite rightly, that freedom of choice in that context was but a subterfuge to avoid disestablishing the dual educational system. Yet where such a system has not previously existed (and *Deal*,[68] *Bell*,[69] and *Downs*[70] all suggest that this is the conventional judicial understanding of many Northern school situations), freedom of choice for the integration-minded, predicated on the wishes of the black community, might well be permissible.

But discussions of constitutional possibility do not foreclose the educational problems. Coupling community control with a "majority-to-minority transfer" provision places the burden of choosing an integrated education on the parent, rather than on the state; in so doing it implies that communitarianism is to be regarded as the norm and integration as the exception. Furthermore, it subjects the parent who prefers an integrated education for his children to considerable community pressure. Whether the burden and the pressure ought to rest with the integration-minded parent is a dilemma not easily resolved.

These problems have become even more important in light of

---

67. The "majority-to-minority transfer" provision has in fact been adopted by numerous Southern school boards which are under desegregation orders. *See, e.g.*, Singleton v. Jackson Municipal Separate School Dist., 419 F.2d 1211 (5th Cir. 1970).

68. 244 F. Supp. 572 (S.D. Ohio), *affd.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 849 (1967).

69. 213 F. Supp. 819 (N.D. Ind.), *affd.*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964).

70. 336 F.2d 988 (10th Cir. 1964), *cert. denied*, 380 U.S. 914 (1965).

recent litigation concerning segregation in the North.[71] These cases reject the presumption that Northern school segregation is the result of factors outside the control of the school board. They indicate a willingness on the part of the courts to examine the intent of local school boards and to identify and to proscribe deliberate segregation resulting from district line drawing, busing, construction, and teacher and student assignment practices. The facts of *United States v. School District 151 of Cook County* clearly support a finding of intentional segregation.[72] White students were bused long distances, past predominantly black schools, in order to enable them to attend all-white schools; black students were denied similar opportunities. In addition, school construction was planned to maintain an all-Negro school, and no black teachers were assigned to the predominantly white schools until 1967. The district, in short, maintained segregated schools as completely and as purposefully as did many Southern school districts. In such a situation, no remedy short of disestablishment would have been appropriate. Furthermore, in two very recent cases, *Davis v. School District of the City of Pontiac*[73] and *Crawford v. Board of Education*,[74] segregation in Pontiac, Michigan, and in Los Angeles, California, was declared unconstitutional without the clear showing of discriminatory intent which was made in the *Cook County* decision. The school boards in both cases had maintained a neighborhood school policy which assertedly took into consideration only proximity and safety factors in setting attendance zones and in building new schools. But such a policy, the *Davis* court suggested, did not absolve the board of responsibility for the segregation that resulted. Intent, the court said, is to be inferred when the local school board has unnecessarily perpetuated a segregated system:

> This Court finds that the Pontiac Board of Education intentionally utilized the power at their [sic] disposal to locate new schools and arrange boundaries in such a way as to perpetuate the pattern of segregation within the City and, thereby, deliberately, in contradiction of their announced policies of achieving a racial mixture in the schools, prevented integration. Where the power to act is

71. *See, e.g.*, United States v. School Dist. 151 of Cook County, 404 F.2d 1125 (7th Cir. 1969); Davis v. School Dist., 309 F. Supp. 734 (E.D. Mich. 1970) (Pontiac); Crawford v. Board of Educ., Civil No. 822854 (Los Angeles Super. Ct., May 18, 1970); Berry v. School Dist., Civil No. 9 (W.D. Mich., Feb. 17, 1970) (Benton Harbor, Michigan); Keyes v. School Dist., Civil No. C-1499 (D. Colo., May 21, 1970) (Denver). *See also* Taylor v. Board of Educ., 294 F.2d 36 (2d Cir.), *cert. denied*, 368 U.S. 940 (1961).

72. 404 F.2d 1125 (7th Cir. 1969).

73. 309 F. Supp. 734 (E.D. Mich. 1970).

74. Civil No. 822854 (Los Angeles Super. Ct., May 18, 1970) (unpub. opinion).

> available, failure to take the necessary steps so as to negate or alleviate a situation which is harmful is as wrong as is the taking of affirmative steps to advance that situation. . . . Where a Board of Education has contributed and played a major role in the development and growth of a segregated situation, the Board is guilty of *de jure* segregation.[75]

These decisions suggest that many heretofore unchallenged school board policies will be unacceptable where those policies serve to promote or to perpetuate racially isolated schools. They do not, however, establish a judicial policy concerning community control. The distinction between control and the proscribed policies is significant: where city boards have adjusted boundaries or assigned teachers, with racially predictable consequences, they have done so without the consent of the communities primarily affected; furthermore, no transfer of power has accompanied the provision of racially differentiated services. That distinction should permit a court to uphold a community control scheme while refusing to sanction racially motivated actions undertaken by a city-wide school board.

It is here that the rationales underlying the *Davis* and *Crawford* decisions diverge. While both cases proscribed segregated schooling, *Davis* based that conclusion on a finding of intentional de jure segregation. The *Davis* court was careful to acknowledge "that a Board of Education has no affirmative duty to eliminate segregation when it has done nothing to create it. . . ."[76] The court found, however, that the Pontiac Board had in fact "created" segregation through an ostensibly color-blind neighborhood school policy. The court in *Crawford* was much more outspoken in its belief in integrated education for all schoolchildren. Although the court found that there was intentional segregation in Los Angeles, it dismissed the distinction between de jure and de facto segregation, concluding that the harm done to black children was the same in both cases, and that the school board's duty to provide integrated education was an affirmative constitutional obligation. The court stated:

---

75. 309 F. Supp. at 741-42. *Cf.* Branche v. Board of Educ., 204 F. Supp. 150, 153 (E.D.N.Y. 1962):

> Education is compulsory in New York. . . ; those for whom education is compulsory by reason of their age are unqualifiedly entitled to attend the public schools of their residence . . . ; . . . taxation for support of the schools is mandatory. . . . The educational system that is thus compulsory and publicly afforded must deal with the inadequacy arising from adventitious segregation; it cannot accept any indurate segregation on the ground that it is not coerced or planned but accepted.

In Blocker v. Board of Educ., 226 F. Supp. 208, *remedy considered on rehearing*, 229 F. Supp. 709 (E.D.N.Y. 1964), the court rejected the argument that the Negro plaintiffs have "chosen" segregation by volunteering to live in one neighborhood, noting the obvious economic disparity between Negro and white neighborhoods.

76. 309 F. Supp. at 742.

> Segregation of children in public schools deprives the children of the minority group of equal educational opportunities and this irrespective of whether the segregation be described or classified as *de facto* or *de jure*.
>
> The labelling of segregation as *de jure* or *de facto* does not change the fact of segregation. Each is merely a legal designation, a legal handle in the formulation of duties. The duty to grant and give all students, including the minority students, equal educational opportunity, is affirmative, the counterpart of depriving by prohibiting.
>
> . . . .
>
> It is practically impossible, in the creation and maintenance of neighborhood schools, and the mandating of attendance thereat, which are in fact segregated, said schools being created and maintained by tax money, to have only *de facto* segregation.[77]

The *Crawford* opinion makes explicit its reliance on psychological evidence which demonstrates the benefit of integrated education for all schoolchildren; it concludes that segregation impairs the confidence of black and Mexican-American children and restricts their aspirations.[78] In this instance, the court's argument rests on shaky educational grounds: it is far from clear that racially isolated schools cannot develop the same self-assurance and the same sense of control over one's own destiny that are promoted by nominally integrated schools.[79] It is not even clear that integration promotes such a sense of control. *Crawford* has in effect adopted a social policy: that the aim of schools is to acculturate all children—to assimilate them into "the mainstream of American society."[80] That policy does not enjoy universal acceptance, either by the white

77. Crawford v. Board of Educ., Civil No. 822854 (Los Angeles Super. Ct., May 18, 1970) at 26, 85-86 (unpub. opinion).

78. Negro and Mexican children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation might be. Negro and Mexican children who attend predominantly Negro or Mexican schools do not achieve as well as other children—Negro, Mexican and White in integrated schools. Their aspirations become more restricted than those of other children. They do not have as much confidence that they can influence their own futures. When they become adults they are less likely to participate in the mainstream of American society, and more likely to fear, dislike and avoid white Americans. It "affects their hearts and minds in ways unlikely ever to be undone." . . . The harm results not alone from the deprival of equal educational opportunity, but additionally in the attitudes which such segregation generates and the effect of those attitudes upon motivation to learn and achieve.

Crawford v. Board of Educ., Civil No. 822854 (Los Angeles Super. Ct., May 18, 1970) at 23-24 (unpub. opinion).

79. Many ostensibly integrated schools continue to group students by track or tested ability, thereby effectively isolating black students from the rest of the school. Such tracking recreates segregation and raises constitutional problems which are beyond the scope of this Article. *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd. sub nom.*, Smuck v. Hobson, 408 F.2d 175 (D.C. Cir.), *appeal dismissed*, 393 U.S. 801 (1969).

80. Crawford v. Board of Educ., Civil No. 822854 (Los Angeles Super. Ct., May 18, 1970) at 23 (unpub. opinion).

community or by the minority communities that will supposedly benefit from the *Crawford* decision. It has little to do with educational consequences but much to do with social intermeddling, and for that reason it seems unfortunate. To require full integration as the only constitutionally acceptable system of education is both unrealistic and unwise. It would make substantially more sense for courts to adopt the rationale of the *Cook County* and *Davis* cases, employing the concept of intentional de jure segregation to strike down school board policies which impose racially segregated schools on nonconsenting individuals, without barring such alternative approaches to equal educational opportunity as community control.

Prediction is difficult in an area of the law as complex as equality of educational opportunity. It does, however, seem unlikely that the Supreme Court, when finally faced with the question, will conclude that integration is an affirmative constitutional right for all children. The factual situations are too diverse, the competing ends —notably, racially and socially heterogeneous schooling versus the maintenance of the unhampered right of association—too irresolvable to warrant such a mechanical solution. Thus, while Northern as well as Southern school boards may find themselves increasingly unable to maintain racially separated schools through an assortment of "neutral" building practices, attendance zoning, or teacher assignment practices, substantial community control—with community consent and the transfer of power over education—should be deemed constitutionally permissible.

III. Is Community Control Constitutionally Required?

Those unsatisfied with the responses of state and city officials to appeals for decentralized schools have lately taken their case to the courts and have asserted a constitutional right to community controlled schools. In the midst of New York's school crisis, one community group in the Ocean Hill-Brownsville section of New York City claimed the right to determine the experimental school district's policies and to hire and fire teachers and principals.[81] In Boston, several black plaintiffs demanded that the city school board be elected by area, rather than on a city-wide basis, in order to ensure the election of at least one black school board member to the five-member board; as an alternative remedy, the plaintiffs proposed the division of the city into self-governing districts.[82] While

81. Oliver v. Donovan, 293 F. Supp. 958 (E.D.N.Y. 1968).

82. Owens v. School Comm., 304 F. Supp. 1327 (D. Mass. 1969).

these cases are nominally couched in constitutional terms, they actually represent unresolved political disagreements over who should control the schools. Community control advocates have thus far been unsuccessful in obtaining judicial relief. Courts, without legislative guidance, have refused to become too deeply involved in the struggle over the power to determine educational policy.

Those who would make community control a constitutional right develop two quite different arguments. The first, relied on in the New York litigation, insists that only through control can equal educational opportunity be achieved, since any other form of school governance inevitably disadvantages poor and black children.[83] The second, the basis of the Boston litigation, draws on the reapportionment decisions[84] to establish for groups of like-minded individuals the general right to manage their own political affairs and the specific right to manage their own schools.[85]

The argument equating decentralization with equal opportunity for poor and black children reflects the disillusionment of the black community with earlier efforts at securing quality education, notably through busing black children to white schools and developing "magnet schools" to draw children from all parts of the city. For a variety of reasons, the most significant of which were minimal financial support and insufficient political force, those measures proved less than adequate to meet the needs of the affected communities.[86] On the basis of that particular educational and political failure, plaintiffs in the New York case, *Oliver v. Donovan*,[87] asserted that any educational effort managed by the city-wide board would inevitably harm poor and black urban school children. In a subsequent suit, arguing for the right of the experimental school districts to survive a city-wide redistricting, New York community groups presented the view that

> [a]s a result of the *past history* of educational deprivation out of which the demonstration projects grew, the immediate design of *this present plan* to eliminate the demonstration projects [described elsewhere in the complaint as "an attempt by the governmental agencies of the state to return members of the nonwhite communities

83. I.S. 201 Complex Demonstration Project Governing Bd. v. Board of Educ., Civil No. 69C—5919 (S.D.N.Y., May 4, 1970) (unreported).

84. *See, e.g.*, Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969), *prob. juris. noted*, 397 U.S. 984 (1970). *See* discussion in text accompanying notes 105-14 *infra*.

85. Owens v. School Comm., 304 F. Supp. 1327 (D. Mass. 1969).

86. *See* Count 1 in the Complaint, I.S. 201 Complex Demonstration Project Governing Bd. v. Board of Educ., Civil No. 69C—5919 (S.D.N.Y., May 4, 1970) (unreported).

87. 293 F. Supp. 958 (E.D.N.Y. 1968). Plaintiffs in *Oliver* included the governing boards of two of the city's three experimental community controlled districts.

> to a status inferior to that of white communities; *i.e.* 'to keep them in their place,' in violation of the Thirteenth Amendment."] and the *ultimate effect* of this plan for the educational future of the non-white communities involved, the state's attempted withdrawal of the community-controlled education experiments, and the education benefits and experimental value inherent in those projects, violates the constitutional mandates of the Thirteenth and Fourteenth Amendments.[88]

The argument is couched in terms of equal protection: when a right is "fundamental" (and it is asserted that education is such a right), state action which discriminates even unintentionally against one group of citizens is unconstitutional unless that action is the only way of furthering a legitimate state interest. School governance is an example of this situation, since a city-wide school board, by attempting to treat all children in the same fashion, benefits only its middle-class constituency. Such differential consequences are viewed as an inevitable concomitant of city-wide educational governance. Furthermore, such centralized governance does not appear to further even such an arguably legitimate state concern as socialization. The argument concludes that decentralization is the only constitutional way to manage city schools, because only decentralization promotes more responsive and more effective urban education.[89]

This analysis may be considered an attempt to clothe in constitutional garb the policy notion that communities have an inherent right to govern themselves. That position has undoubted political appeal. It also finds some support in the historical record, at least prior to the mid-nineteenth century. While Massachusetts recognized as early as 1642 that "the great neglect of many parents and masters in training their children in learning and labor, and other implyments which may be proffitable to the common wealth . . ."[90] called for colonial intervention, that intervention was, for almost two hundred years, limited to statutes encouraging the local community to provide some form of education.[91] No guidelines were established;

88. Amended Complaint at 14, I.S. 201 Complex Demonstration Project Governing Bd. v. Board of Educ., Civil No. 69C—5919 (S.D.N.Y., May 4, 1970) (unreported) (emphasis added).

89. *See* Note, *School Decentralization: Legal Paths to Local Control*, 57 GEO. L.J. 992 (1969).

90. *Mass. School of Law of 1642*, in H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 28 (7th ed. 1968).

91. Of course, the pattern of state responsibility differed from state to state. New York was one of the first states to recognize the virtues of centralized public education. The Southern states did not, for the most part, require public education until after the Civil War. Few, if any, states provided substantial financial support for public schools. *See generally* L. CREMIN, THE AMERICAN COMMON SCHOOLS: AN HISTORIC CONCEPTION 91-125 (1951); B. BAILYN, EDUCATION IN THE FORMING OF AMERICAN SOCIETY (1960).

no requirements were set; and no aid was provided. The community provided the initiative, determined who would attend school, chose those who would teach in the schools; and decided what would be taught. The ratification of the Federal Constitution did not alter the pattern: none of the original thirteen states provided for education in their state constitutions. Indeed, by 1820 only thirteen of the then twenty-three states made constitutional reference to education.[92] A decade later a Massachusetts educator, distinguishing between public and private schools, noted that public schools "are under the supervision of selected men, responsible more or less directly to the community. The private schools have no supervision, or only that of the parents."[93] Nothing in the debates of that time indicates a much different role for the states. Indeed, it was not until the middle of the nineteenth century that states established statewide boards of education and appointed state superintendents of education, thereby making clear their concern with the efficiency and quality of public schools.[94]

This historical evidence belies the notion that the state's exercise of dominion over education is both inevitable and irresistibly correct. Yet, although the political and historical record is appealing, it makes a far from compelling legal argument. Courts have long held that communities have no inherent legal right to "control" their schools.[95] In legal theory, at least, the state proposes *and* disposes with respect to public education, while local school districts carry out the state's wishes.[96]

Well before community control of schools became a common demand of Northern black communities, other groups resented the checks placed on local authority by distant and seemingly unresponsive state legislatures. They asserted that education was of primary concern to the community, not to the state, and should therefore be controlled by the community. Courts have consistently rejected such assertions. As the Indiana supreme court stated in an oftencited case:

> Essentially and intrinsically the schools in which are educated and trained the children who are to become the rulers of the common-

92. COUNCIL OF CHIEF STATE SCHOOL OFFICERS, EDUCATION IN THE STATES: NATIONWIDE DEVELOPMENT 135 (J. Pearson & E. Fuller eds. 1969).

93. L. CREMIN, THE AMERICAN COMMON SCHOOLS: AN HISTORIC CONCEPTION 137 (1951).

94. EDUCATION IN THE STATES, *supra* note 92, at 75.

95. The cases are collected in E. BOLMIER, THE SCHOOL IN THE LEGAL STRUCTURE (1968) and R. HAMILTON & P. MORT, THE LAW AND PUBLIC EDUCATION (1959).

96. Constitutions in every state except Connecticut require that the state maintain free public schools; the Connecticut Constitution otherwise provides funds for public schools. E. BOLMIER, *supra* note 95, at 65-67.

> wealth are matters of State, and not local jurisdiction. In such matters, the State is the unit, and the legislature the source of power. The authority over schools . . . is a central power residing in the Legislature of the State. It is for the law-making to determine whether the authority shall be exercised by a State board of education, or distributed to county, township, or city organization throughout the state . . . .[97]

The "inherent right" argument relies more heavily on the asserted rights of certain groups than it does on the concerns of local governmental units. Proponents of community control have focused on black communities and have contended that, at least for black people, control is a prerequisite to educational equality. They indict the schools for failing to reach whole segments of the population, for imprisoning rather than instructing school children,[98] and for creating a permanent underclass, unaware of its potential and doomed to repeat the careers of its fathers. The increasing number of school drop-outs is no longer thought to represent personal failure or social-class differences, but rather is considered symptomatic of the systemic breakdown of the public schools. Advocates of community control argue that, in light of such a breakdown, they can do no worse in running the schools. Indeed, they believe that they will be able to do far better because of their more intimate knowledge of the community's children and the problems which those children face.

A further level of argument deals with the failure of existing school systems to impart to children a sense of control over their own destinies. This argument derives empirical support from *Equality of Educational Opportunity*,[99] a massive report on American public education. The survey that was the basis for that report included several questions designed to measure "fate control"—the degree to which children feel that their own efforts, rather than fate, determine the course of their lives. The responses indicated a striking correlation between an individual's sense of fate control and his performance in school. Supporters of community control have relied on this finding. They argue that community controlled schools will give black students a sense that they can reconquer their surrendered identity, and that this sense will in turn enable those students to

97. State v. Haworth, 122 Ind. 462, 465, 23 N.E. 946, 947 (1890). For more recent development of this point, see Fruit v. Metropolitan School Dist., 241 Ind. 621, 172 N.E.2d 864 (1961); Fort Wayne Community Schools v. State, 240 Ind. 57, 159 N.E.2d 708 (1959).

98. *Death at an Early Age*, the title of Jonathan Kozol's book, suggests a metaphor more ominous than imprisonment.

99. U.S. NATL. CENTER FOR EDUC. STATISTICS, EQUALITY OF EDUCATIONAL OPPORTUNITY (J. Coleman ed. 1966).

succeed more regularly in what was formerly viewed as a hostile and ego-defeating school environment.[100]

To argue that the failure of the present educational system makes decentralization a constitutional requirement is to over-simplify a vexing educational problem. While the argument obtains support from commonly held misgivings about urban schooling, it proposes as the only acceptable remedy what is in fact only one of several alternative and competing choices. The consequences of each competing choice are not altogether clear. Even after numerous academic skirmishes, no one really knows what pedagogic consequences will follow from altering the method of school governance. Nor is it self-evident that slackness in the central school administration bears on or causes disasters in the classroom. Perhaps it does; but that conclusion depends on speculations about human nature and political behavior, speculations not usually accorded constitutional recognition.

Other strategies for securing equal educational opportunity have recently been proposed. State educational financing schemes have been attacked on constitutional grounds in an attempt to prevent states from making school support a function of community wealth, and these attacks promise added dollars to presently impoverished urban school systems. Two proposed remedies—district power equalizing and family power equalizing—would eliminate the effect of wealth variations, while stressing the importance of local choice and fiscal control.[101] Power equalizing makes the quality of educational services a function of effort—the result of how heavily the relevant unit, whether district or family, chooses to tax itself for education. It would enable any school district to determine at what rate it wished to be taxed for education and to spend the amount that is fixed by the state to correspond to the tax rate chosen. Each district would have to make an equal effort to get equal dollars. Family power equalizing operates on the same principle. The relevant unit would be the family, rather than the school district; and the family's choice would be reflected in a "tuition voucher" which the family

100. Community control advocates also see community-run schools as a way of forcing the white establishment to take their demands seriously. Viewed in this way, the community school becomes a power base in a very traditional sense—a mode of politicizing the black community and a ready source of jobs and patronage. *See* N. GLAZER & D. MOYNIHAN, BEYOND THE MELTING POT (1963), which describes similar political forays by other New York City minority groups.

101. *See, e.g.*, Coons, Clune, & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financing Structures*, 57 CAL. L. REV. 305 (1969); Michelman, *The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

could use to support any educational alternative, public or private, that it chose.

Power equalizing schemes—or other alternatives such as educational parks[102] or metropolitan school districts—are not necessarily preferable to community controlled schools. They may not even be inconsistent with some community control schemes. They are, nonetheless, alternatives. Community control presumes the existence of a functioning community of like-minded citizens. Family-power-equalizing plans stress the importance of individual, not community, choice. To opt for one, and to give it constitutional status, cuts off alternatives prematurely without educational or legal warrant. For that reason, judicial intervention ought to be directed toward preserving and promoting choices, rather than toward favoring any particular educational reform such as community control.

A second line of constitutional argument focuses not on the quality of education that community controlled schools would assertedly ensure, but on the community's political rights to govern its own schools. It challenges the practice of city-wide elections for school board members, asserting that that practice ensures the election of an all middle-class board, thereby effectively disenfranchising the poor and black urban communities. In *Owens v. School Committee of Boston*[103] that city's black community has brought suit in federal court, arguing that the city's practice of city-wide elections for all school board members acts to deny ghetto residents equal protection of the law, in that it affords the ghetto community no effective way of articulating its interests through the election procedure. The *Owens* plaintiffs have requested district elections to the city-wide board and a decentralization of many educational functions. Their argument is based on those cases which have noted that an otherwise acceptable election scheme would be unconstitutional if it "operated to minimize or cancel out the voting strength of racial or politicial elements of the voting population."[104] Admittedly, the Supreme Court has never yet identified such a situation; its remarks are dicta only. In *Chavis v. Whitcomb*,[105] however, a three-judge federal district court, sitting in the Southern District of Indiana, overturned a plan for electing members of the Indiana state legislature, because that plan included ghetto blacks in a large multimem-

102. Educational parks are district-wide educational centers which offer a wider range of services than any single school could afford.

103. 304 F. Supp. 1327 (D. Mass. 1969).

104. Fortsen v. Dorsey, 379 U.S. 433, 439 (1965). *See also* Burns v. Richardson, 384 U.S. 73 (1966); Kilgarlin v. Hill, 386 U.S. 120 (1967).

105. 305 F. Supp. 1364 (S.D. Ind. 1969), *prob. juris. noted*, 397 U.S. 984 (1970).

ber district dominated by a middle-class white majority, thereby ignoring the cognizable interests of the ghetto community and denying it effective representation.

Chavis and *Owens* are factually distinguishable. In *Chavis*, the ghetto was an unrepresented part of a larger multimember district, yet was as populous as other, single-member districts created by the same plan. In Boston, every school board member is elected on a city-wide basis.[106] Indeed, the Boston arrangement might conceivably fit within the "uniform district principle" which the *Chavis* court instructed the Indiana legislature to "give considerable attention to."[107] Yet this distinction does not foreclose the community control advocates' argument in *Owens*. Central both to the *Chavis* opinion and to the plaintiff's claim in *Owens* is a set of legal and political assumptions which signal a substantial shift in judicial thinking about representation and governance, and which afford unprecedented legitimacy to the exercise of power by homogeneous groups.

The root assumptions are that groups of individuals act in political concert and that, moreover, they have a judicially protected right to do so. The court in *Chavis* undertook as its principal task the identification of "an injured minority group residing in a modern 'ghetto.' "[108] It devoted the largest part of its opinion to an examination of demographic, social, and political indicators which bear on that identification. Such inquiry is quite different from the Supreme Court's practice, in the reapportionment cases, of focusing on dilution of individual voting power, rather than on group interests.[109] The Court's practice, while avowedly politically neutral, in fact represents an emphasis on one among a variety of possible principles of political representation. As Justice Frankfurter argued in *Baker v. Carr*,[110] attempting to steer the Court away from this "political thicket":

> One cannot speak of "debasement" or "dilution" of the value of the vote until there is first defined a standard of reference as to what a vote should be worth. What is actually asked of the Court . . . is to

106. Another possible distinction—that *Chavis* concerns legislative districts while *Owens* concerns school districts—has apparently been rejected by the Supreme Court. *See* Kramer v. Union Free School Dist., 393 U.S. 818 (1969). *See also* Avery v. Midland City, 390 U.S. 474 (1968); Oliver v. Board of Educ., 306 F. Supp. 1286 (S.D.N.Y. 1969).

107. 305 F. Supp. at 1392.

108. 305 F. Supp. at 1373.

109. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964). Wright v. Rockefeller, 376 U.S. 52 (1964) does not recognize the possible effect of gerrymandering on racial groups.

110. 369 U.S. 186 (1962).

> choose among competing bases of representation—ultimately, really among competing theories of political philosophy.[111]

The *Chavis* court would substitute the community for the individual, at least where the community is a "modern ghetto"—black, poor, and geographically isolated. It is clear, however, that the *Chavis* court would not accept *any* black community. The court reviewed income levels, housing standards, educational records, and political representation on a district-by-district basis; and it ultimately excluded from the ghetto one relatively prosperous black district. Having completed that task, it presumed, without supporting argument, that the area that it had mapped out shared certain political concerns. It presumed further that those concerns could be adequately represented in the state legislature only by an elected representative of the ghetto. Thus, the court found that the ghetto had a constitutional right to identifiable representation, at least with respect to matters of state-wide concern, even though the state had granted it no formal and separate political existence.

This set of presumptions relied on in *Chavis* is inconsistent with the notion of a uniform districting system, a notion that the court alluded to in several instances. If one accepts the court's reasoning, it is not just any uniformity of treatment—such as all single-member districts, all multimember districts, or an at-large election for the entire state—that will satisfy the constitutional requirements. Uniformity must give way to the interests of the ghetto. As the court itself noted, "the maximum size of the uniform districts should, of course, not be so large as to create the improper dilution of minority group voting strength found in the instant case."[112]

The *Chavis* assumptions about the legitimacy of bloc representation lie at the heart of the Boston school districting suit and indeed are basic to the political philosophy inherent in decentralized schools. The proponents of decentralization argue that black and poor parents have identifiable common interests in the education of their children, that those interests are distinguishable from middle-class concerns, and that those interests require recognition in a school district managed by and for the community. That view is, of course, inconsistent with the conventional philosophy of American schooling—a philosophy which insists that the mission of the schools is to Americanize, to make all children equal by making them all the same, a philosophy which has sought since the mid-nineteenth century to produce a common breed of men by socializing them in com-

111. 369 U.S. at 300 (dissenting opinion).

112. 305 F. Supp. at 1392.

mon public schools. In part, the control argument embodies a recognition of the failure of that conventional view. It demands that the common-schooling ideal be seen not as the exclusive method to provide schooling, but merely as one alternative solution embodying —like the "one man-one vote" reapportionment standard—one particular set of political and social value choices. The community control supporters argue that since the universal and common approach has failed, it is necessary to adopt an approach which emphasizes the particular and the different. They would establish their own school district in the same way that *Chavis* created an electoral district.

Such an argument puts the courts in an uncomfortable position. It suggests the limitations of the analysis that the *Owens* court indulged in:

> The system of electing members of a governmental board in an at-large election is, of course, a device quite commonly used. There are advantages and disadvantages to the use of either the at-large or the district system of election. One supposedly ensures the election of the type of official who can command a wide support throughout the whole community and will be representative of and responsive to the needs of the community as a whole. The other is designed to ensure representation of the particular interests of the separate geographical segments of the community, perhaps at the expense of the general interest.[113]

Yet, as *Chavis* demonstrates, the at-large system preserves the niceties of the individual vote but effectively diminishes the power of the minority group. If the interest of the group—or of certain otherwise powerless groups—demands recognition, the recitation of alternatives is simply inadequate.

The alternative judicial course rejected in *Owens* is, however, profoundly troubling. That course requires the acceptance of the *Chavis* rationale to elevate the single-member, community-based election district to constitutional status, the application of that principle to school board elections, and the extension of that doctrine to force decentralization. It binds the courts to a set of assumptions about group interests—and about the adequacy of group representation to secure those interests—that are rooted in assertion and ideology rather than in law. It commits the court to an almost constant search for a community entitled to a political recognition, even though a court is ill-equipped to make that search. It suggests that there is one set of standards for poor and black communities and another, thus far unarticulated, set for other sorts of commu-

113. 304 F. Supp. at 1329.

nities. Moreover, it assumes that only through decentralization can group representation be achieved. By making that assumption, it preserves like-mindedness at the expense of heterogeneity and choice —attributes which, for schooling if not for electoral districts, are considered by some authorities to be virtues. The inadequacy of adjudication as a means of making this difficult set of decisions is likely to lead the courts not to insist on decentralization, but rather to defer to the body politic for guidance and political choice making.[114]

IV. Conclusion

At this point in time, the most significant judicial foray into the realm of community control is the opinion of the federal district court in *Norwalk CORE v. Norwalk Board of Education.*[115] That opinion provides little encouragement to those who would have the courts resolve this tangle of educational, legal, and political questions.

The series of occurrences that gave rise to the litigation in this case began in the early 1960's, when the Norwalk school board concluded that de facto segregation was both morally wrong and educationally damaging, and took steps to eliminate it. While the board's first thought was to bus children into and out of the black ghetto, its ultimate remedy was to put an end to de facto segregation by phasing out the town's ghetto schools and busing all of the black students out of the ghetto and into the white schools, while white children would continue to go to neighborhood schools.[116] Initially, this plan received the approval of all segments of the community, but in 1968 as the last ghetto elementary school was about to be closed, the local chapter of the Congress of Racial Equality (CORE) protested. When the school board ignored the protest, CORE sued the board, seeking to prevent it from closing the ghetto school.[117] In

114. This is not, of course, to suggest that the courts ought not intervene when legislative action betrays clear racial bias. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960).

115. 298 F. Supp. 213 (D. Conn. 1969).

116. The board relied on several factors to justify its decision not to bus white children into the ghetto schools. It took into account what it regarded as the bad reputation of the ghetto area, a factor which it felt would disquiet parents throughout the community. It felt that Norwalk schools could deal more readily with blacks' psychological adjustment to predominantly white schools than they could with white students' and parents' adjustments to what had been predominantly black schools. Most important, the board believed that it was not politically feasible to require white schoolchildren to attend the ghetto schools.

117. Norwalk CORE v. Norwalk Bd. of Educ., 298 F. Supp. 213 (D. Conn. 1969).

its suit, CORE called at first for the reopening of black neighborhood schools, arguing on equal protection grounds that if whites were entitled to neighborhood schools, then blacks were entitled to their own schools as well. Subsequently, CORE modified the suit to insist upon cross-busing, arguing, again on equal protection grounds, that if black children were to be bused to white schools, then white children should be bused to black schools.

The suit posed for the court the kinds of dilemmas that have already been discussed. How actively, for example, should the court review the decision of the school board? Should it defer to the wisdom of the board, which was exercising its statutory responsibility for making policy, or should it reject the board's claim to expertise? What sort of evidence should the court consider in reaching its decision? Should it rely on the central finding of the *Coleman Report* that "a pupil's achievement is strongly related to the educational backgrounds and aspirations of the other students in the school . . . . Children of a given family background when put in schools of different social composition, will achieve at quite different levels,"[118] and thus conclude that social-class integration is necessary in order to secure equality of opportunity? Or is it appropriate for a court to seek out evidence designed to measure the sentiment of the affected community with respect to integration? If a court determines that one community wants to manage its own schools, should that determination be conclusive? Which community's interest should the court bear foremost in mind: that of the black neighborhood, that of the city community, or that of some broader community? The court did not deal with all of these questions. No evidence was introduced concerning the educational advantages of neighborhood schools or the disadvantages of busing. Thus, the court was not obliged to decide between integrated education and community controlled education. It considered only whether the manner in which the integration of policy was implemented unduly burdened the black community, and it ultimately approved the Norwalk busing scheme.[119]

The court might have focused on the burden implicit in the fact that black children were one hundred times more likely to be bused to school than were white children. The court might then have required the school board to provide compelling justification

118. U.S. NATL. CENTER FOR EDUC. STATISTICS, EQUALITY OF EDUCATIONAL OPPORTUNITY 22 (J. Coleman ed. 1966).

119. 775 of 1,581 Negro and Puerto Rican children in Norwalk were bused in the 1967–68 school year, while only 39 of 7,984 white children were bused. 298 F. Supp. at 216.

for not adopting an approach that more equitably distributed the burden of being bused. But instead the court adopted a wavering legal standard. Although the opinion appears to subject the board's decision to "rigid scrutiny,"[120] the standard that was ultimately—and improperly—relied upon requires that the plaintiffs show "government action which without justification impose[d] unequal burdens or award[ed] unequal benefits . . . ."[121] The explanation for this discrepancy lies in the court's characterization of the complaint as alleging *neighborhood,* rather than individual, discrimination. The court upheld the school board's plan because the board had justifiably distinguished between neighborhoods which were appropriate for schools and others—primarily the ghetto—which were inappropriate.[122]

The opinion made it clear that individuals could not be treated so cavalierly: "It is fundamental that the rights of individuals in similar circumstances must be governed by the same rules. . . ."[123] Neighborhoods, however, were an altogether different matter:

> Although people are equal, and governmental classification by race will not be tolerated, neighborhoods are not. . . . While neighborhoods theoretically remain equal, as a practical matter they do not remain equal and the law does not command that they be treated equally. . . . It is doubtful that residents of one neighborhood appropriately may claim the benefits of circumstances similar to another, where a neighborhood classification has been made.[124]

Indeed, the court hinted that the school board may have had an obligation to distinguish between good and bad neighborhoods: "Had the board ignored this reality, it might well not have fulfilled its duty of providing the best education for all children of Norwalk."[125] The court's distinction between individuals and neighborhoods is very troublesome. The plaintiffs in the case were not neighborhoods, but organizations representing individual citizens. The rights being asserted were those of individual schoolchildren who happened to live in a single neighborhood and who were treated differently from the children of other neighborhoods. Yet the court never faced the most vital constitutional issue: Can the happenstance of residence justify differential treatment of individuals?

120. 298 F. Supp. at 223.

121. 298 F. Supp. at 225.

122. In a sense, this decision is the converse of *Chavis*: it recognizes the existence of neighborhoods but denies their asserted common concerns.

123. 298 F. Supp. at 222.

124. 298 F. Supp. at 222-23 (emphasis deleted).

125. 298 F. Supp. at 223.

Instead, it concluded "that there is a correlation between the less desirable (from the standpoint of location of schools) neighborhoods of Norwalk and neighborhoods of predominantly black and Puerto Rican population. . ."[126] and that this correlation justified the school board's decision to close schools in the black and Puerto Rican sections of Norwalk.

If the court's legal reasoning poses problems, the tacit educational assumptions are almost indefensible. For instance, the court stated: "Just as one neighborhood may afford a more suitable location for a factory, another may provide a more suitable environment for the location of a school."[127] The opinion never suggests what that "more suitable environment" entails, although from the distinction that is drawn one might surmise that green grass, quiet, and an area inhabited by whites are primary attributes. Yet why should these be essential to successful schooling? Many communities have sought out factories for schooling sites, both because they provide big, cheap buildings and because they provide some tangible connection between school and community.[128] These political and educational judgments are not matters in which the courts usually regard themselves as having competence, and the *Norwalk* court's foray into this area only affirms the wisdom of the usual judicial attitude.

In one sense, the conclusion of this discussion is obvious. Community control is constitutionally permissible if the community has opted for such control and if dissenting members of the community may send their children out of the local district to integrated schools. Community control is not, however, constitutionally required. To give it or any promising educational alternative constitutional status would restrict choice without pedagogic or legal warrant.

The discussion raises a second set of questions, concerning the role of the judiciary in resolving social issues. Perhaps the most noteworthy feature of the segregation litigation has been its incapacity to bring about the changes that judicial decrees have mandated. The law requiring the disestablishment of dual-school systems is plain. But equally plain is the fact that in the 1968–69 school year, fourteen years after *Brown II*,[129] less than one-fifth of all Southern black

126. 298 F. Supp. at 222.

127. 298 F. Supp. at 222.

128. In Philadelphia, the Mantua Mini School and the Advancement School are both located in former factories. AGENDA FOR CHANGE (1969), a study recently completed by the Harvard Graduate School of Education, urges that Lowell, Massachusetts, convert an old mill into an educational resource center.

129. 349 U.S. 294 (1955).

schoolchildren attended even nominally integrated schools.[130] In part, the explanation for this massive failure of implementation rests with the perseverance of the Southern white community in developing strategies to evade *Brown*. Yet a substantial part of the explanation lies with the failure of litigation as a device for bringing about social and political change.

Litigation concerning social policy may be viewed as a means of benefitting a badly treated community, with only minimal involvement of that community. This fact, which has seemed to be litigation's particular strength, now appears also to be a significant weakness. Courts can declare rights and obligations, but their capacity to enforce those declarations is far more limited. Enforcement depends primarily on the willingness of the beneficiary to lay claim to his newly gotten rights. The fact that "freedom-of-choice" plans served to perpetuate segregated schools in the South[131] indicates the inability of the intended beneficiary—in that instance, the Southern black community—to assert its rights. Had blacks exercised their option and enrolled at the formerly all-white schools, the freedom-of-choice plans could conceivably have led to integrated schools. In fact, however, the blacks remained with such consistency in the schools which they had previously attended that the Supreme Court was led to conclude that freedom-of-choice plans did not constitute a permissible method of disestablishing the dual school systems.[132]

In would be inappropriate to fix blame for this incapacity to assert rights. Yet the lesson seems plain: the role of the courts in dealing with these questions will almost inevitably be a limited one. It has been suggested in this Article that the stated judicial concern with free association should be focused on preserving educational alternatives, such as community control, where those alternatives do not violate the constitutional command of equal educational opportunity. Beyond that, the questions remain ideological and political. They will be resolved not by judicial decree, but rather by an assertion of community will on the part of those most directly and most adversely affected by the public schools.

130. N.Y. Times, Nov. 2, 1969, § 4, at 1, cols. 5-6.

131. *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968); Goss v. Board of Educ., 373 U.S. 687 (1963).

132. Green v. County School Bd., 391 U.S. 430 (1968).